Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Treatment of Operator Services Under Price Cap Regulation	)	CC Docket No. 93-124
	)	
Revisions to Price Caps Rules for AT&T	)	CC Docket No. 93-197
	)	

REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Richard J. Metzger
General Counsel
Association for Local Telecommunications Services
1200 19th Street, N.W., Suite 560
Washington, D.C. 20036

(202) 466-3046

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SUMMARY

The Second Further NPRM proposes dismantling much of the Commission's price cap regulation for incumbent local exchange carriers ("ILECs"), even though just nine months ago in this same docket the Commission concluded that: "[b]ecause the LECs appear to retain substantial market power in providing local exchange and access services, regulation continues to be needed to achieve the goals of the Communications Act, and to increase consumer welfare" (First Report and Order released April 7, 1995, ¶ 92; emphasis supplied).

None of the Initial Comments reveal any factual basis for such an abrupt sea change in the Commission's approach to price cap regulation. USTA leads the ILEC charge for reduced regulation, but the only evidence USTA offers now which was not in front of the Commission nine months ago is: (1) a Wall Street Journal article describing AT&T's desire to offer flat rate bundled service for local, toll and wireless services; (2) an article in Telecommunications Reports reporting competitive telecommunications revenues of $1.5B in 1995, and predicted revenues of $20B by 1998; (3) an updated list of existing and planned competitive facilities; (4) a recapitulation of NYNEX's ex parte in the USPP proceeding concerning competition in the New York City LATA; (5) brief references to contentions made by SWB concerning competition in Houston and Dallas; and (6) reference

to the fact that 66 companies filed requests for certification when California decided to open the local market to competition (USTA Comments at 4-6).

These contentions fall far short of the "signs of changing market structure" which the Second Further NPRM proclaims to justify its abandonment of traditional ILEC price cap regulation (at ¶ 5). The real picture is ably laid out by TRA (TRA Initial Comments at 6-8; emphasis supplied):

- The Common Carrier Bureau's Fall 1995 "Common Carrier Competition" report shows that only four states have "active competition in switched local service."
- The Common Carrier Bureau's Spring 1995 "Common Carrier Competition" report shows that ILECs receive over 97% of all access revenues.
- The First Report and Order in this docket concluded just nine months ago that: "[w]hile local access competition has begun to develop, the LECs continue to exercise a substantial degree of market power in virtually every part of the country, and continue to control bottleneck facilities" (at ¶ 368).

Thus, while the Second Further NPRM deserves credit for its creativeness in speculating how ILEC price cap regulation might eventually change with the advent of competition, the unavoidable fact is that meaningful competition is still too remote to support any substantial revision of ILEC price cap regulation at the present time. Indeed, one of the largest ILECs acknowledges that the Second Further NPRM: "is an all or nothing approach" (NYNEX Comments at 2).

The real task of the Second Further NPRM should be to

advance competition as quickly as possible to the point where modification or even elimination of ILEC price cap regulation would make sense. One such approach is discussed by NYNEX, which urges the Commission to adopt a "holistic view" under which special and switched access would be treated separately.

Under NYNEX's proposal, the Second Further NPRM's initial stage would be separated into three parts. Framework I-A would become the default mode, where no competition yet exists. Framework I-B would apply where entry barriers had been removed throughout most of an ILEC's service territory (using a checklist approach to determine barrier removal for switched access services), and appreciable competitive entry also exists. Framework I-C would apply where all barriers were removed, and competition exists throughout major market segments. Each stage would be accompanied by increased pricing flexibility, and modification of other price cap rules (NYNEX Comments at 5-8).

The fundamental virtue of NYNEX's plan is that it encourages the ILECs to remove entry barriers in order to receive price cap deregulation. In this respect, NYNEX's approach reflects the same basic view expressed in the initial comments of such parties as AT&T, Time Warner, and ALTS. While all these comments contain worthy preconditions for ILEC price cap freedom that could well be incorporated in a final plan, perhaps the most effective action for the Commission now would be to recognize that its various pro-competitive tasks must be linked to the ILEC

regulatory agenda. Accordingly, the Commission should:

- Decide to link all substantial regulatory changes (including access reforms) to the LECs' progress on removing barriers to competition; and,

- Solicit comments concerning the specific factors that should be considered in various "checklists" pertaining to price cap reform, access charge changes, universal service reform, etc., much like the "interLATA checklist" contained in the recently enacted Federal legislation. Once the basic outlines of each "checklist" has been sketched, its particulars could then be determined in specific proceedings.

Adoption of such an umbrella approach might seem unfamiliar at first. But taking a course which "rewards" ILECs for their progress in removing entry barriers with regulatory freedoms -- be they changes in price caps, access charges, productivity factors, or earnings limitations -- will ultimately prove to be a far more expeditious path to full and effective competition than surrendering control of the ultimate timing of meaningful competition to the ILECs by granting them a premature escape from price cap regulation.

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REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Pursuant to the Second Further Notice of Public Rulemaking ("Second Further NPRM") released September 20, 1995, in the above-captioned proceeding, the Association for Local Telecommunications Services ("ALTS") hereby replies to the initial comments concerning the Second Further NPRM's proposal to "establish a framework for three gradations of increasingly less stringent price regulation" (id. at ¶ 2).

I. CHANGES IN PRICE CAP REGULATION OF ILECS SHOULD BE LINKED TO THE REMOVAL OF COMPETITIVE BARRIERS IN THE MANNER DESCRIBED BY NYNEX AND OTHER PARTIES.

Many incumbent local exchange carriers ("ILECs") understandably endorse the Second Further NPRM's proposed relaxation of ILEC price cap regulation, most notably the the United States Telephone Association, which states it represents over "98 percent of the

current access lines in service" (USTA Comments at 1).[1] All other industry segments, however, take a very different view.

Interexchange Carriers - The major interexchange carriers reject the Second Further NPRM's approach. AT&T, for example, states: "there is no practical likelihood that the LECs' dominance in these markets will decline meaningfully for many years ... The Commission should focus its energies on assuring that the preconditions for competition are effectively implemented ..." (AT&T Comments at i). AT&T concludes that: "A showing of effective actual competition cannot, however, be based simply on meeting a 'checklist' such as that described in the SFNPRM (¶ 110), which consists solely of preconditions to competition. Rather, any showing offered to support reduced regulation must include specific measurements which confirm the actual presence of substantial facilities-based competition in the relevant product and geographic market" (AT&T Comments at 16-17; emphasis in original).

MCI agrees with the need to require ILECs to complete a checklist prior to any price cap relief: "Before the Commission grants the LECs streamlined treatment, it must determine that the LECs have met a competitive checklist which ensures that other companies can compete effectively with the LECs" (MCI Comments at i). Sprint feels similarly: "True competition requires the presence of two or more facilities-based alternative access

[1] USTA's calculation of its size does not appear to reflect the recent departure of the Sprint exchange companies.

providers ... Until these conditions are present in the local services market, deregulation of interexchange access services is not warranted" (Sprint Comments at 24).[2]

Large Customer Groups - Large customer groups share the interexchange industry's concerns about the Second Further NPRM's approach. Ad Hoc Telecommunications Users Group points out that: "... LEC markets are not yet effectively competitive. The LECs may face some niche competition -- competition for some services in some limited geographic markets. For the most part, the LECs possess market power. Their relentless lobbying and public relations efforts cannot change this fact ... The mere elimination of barriers to competition, through implementation of a so-called

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[2] See also the Initial Comments of LDDS WorldCom: "... reduced regulation of LEC pricing should not be discussed unless the LEC first makes available a wholesale network platform at cost-based rates for use by other providers in developing their own retail services ... In other words, the 'competitive checklist' in the Notice does not reflect the minimum steps necessary to permit competition in the market for full service telecommunications packages" (at 33-34; emphasis supplied); and LCI International: "The Commission should not even consider giving the LECs greater pricing flexibility for switched access services unless and until the LECs can show that the development of actual competitive alternatives for each type of access service justifies further pricing flexibility for that particular service" (at 5).

CompTel alone among the long distance industry does not see a totally compelling need for a checklist approach: " ... Local competition is not a legitimate surrogate for access competition, rendering the competitive checklist approach irrelevant to pricing flexibility for switched access service. Accordingly, if pricing flexibility for switched access can be implemented in a manner that avoids discrimination and results in rates declining toward cost, it should be adopted without regard to the state of competition" (at 37).

'competitive checklist' is not sufficient justification for relaxed regulation of LEC access service. Implementation of such a well-conceived 'competitive checklist' may well be necessary to facilitate the development of access service competition, but is insufficient in itself to justify significant regulatory relief" (at iii-iv).

The Information Industry Association and the Information Technology and Telecommunications Association share similar concerns: "IIA urges the Commission to condition the grant of any such flexibility upon the existence of effective competition that will protect users from unlawful discrimination while ensuring that users have the economic benefits of a more efficient and technologically advanced network infrastructure" (at 1); and "TCA is concerned that the proposals go too far, too fast" (at 4; emphasis supplied).[3]

Competitive Providers - Competitive providers of telecommunications are squarely united in opposing any ILEC price cap relief prior to the establishment of effective competition. MFS argues that: "Streamlined LEC regulation should only be

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[3] Only the consumer with perhaps the greatest market power of all, the General Services Administration, would prefer that nothing delay granting the ILECs the ability to freely issue price discounts: "GSA believes that the Commission's pricing flexibility proposals are justified on their own merits without regard to the state of competition in the interstate access markets. For this reason, GSA opposes the Commission's proposal to tie these changes to demonstrations of reduced barriers to entry" (at i).

permitted following a finding of actual, effective competition" (at 9). TCG explains that: " .. The Commission must establish linkages between the ILEC's achievement of pro-competitive objectives (e.g., completion of 'competitive checklist' elements), the observance of actual, measurable competition in the market, and the granting of price cap relief to the ILEC" (at 2). Time Warner points out that: "Relaxing price cap safeguards and granting LECs increased pricing flexibility prior to a conclusive showing by the LECs that they face actual competition would significantly impede progress toward the Commission's goal of developing a sustainable robust competitive marketplace" (at i). ICG states: " ... The Commission must specifically condition pricing flexibility for the LECs on just and reasonable access to local exchange bottleneck facilities and full interconnection with the LECs on just and reasonable terms" (at 2).[4]

NYNEX's Proposal - NYNEX's initial comments are important because they reflect the admission by a large ILEC that: " ... The

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[4] See also Comcast: "The core focus of a regulatory paradigm for local exchange competition must be on promoting new entry by competing facilities-based local exchange service providers" (at ii); Cox Enterprises, Inc.: "Only after the necessary regulatory support structure for local exchange competition is in place and meaningful competition begins to emerge should the Commission begin to determine what further regulatory relief is warranted for incumbent LECs" (at 8); and the National Cable Television Association, Inc.: "Proposals in the Second Further Notice to alleviate regulation are premature and should be considered only when the LECs' bottleneck control over essential facilities is removed, mechanisms necessary to facilitate competitive entry are in place, and competitive forces are present that can effectively replace regulation" (at 2).

truly significant difference [in the Second Further NPRM] is between Phases I and II. In Phase I, the LEC is highly regulated, and in Phase II the LEC is effectively deregulated" (at 3; emphasis supplied). Accordingly, NYNEX proposes that:

> "The model should provide increasing pricing flexibility as a LEC opens its markets to more competition and as the competitive local exchange carriers develop a competitive presence in a particular market. It should also serve as a framework for actions in other proceedings concerning access charge reform and prescription of price cap productivity factors. By defining specific phases that will occur in the transition from a baseline, non-competitive environment to a more competitive local exchange market, the model would provide points at which the Commission could permit changes in rate structure, such as increases in end user common line charges, consolidation of price cap service categories and baskets, and adjustments in productivity factors to reflect the fact that LECs in the transition to competitive markets tend to experience lower productivity growth than LECs in monopoly markets" (id.).

NYNEX concludes that such a structure would: "provide an incentive for the LECs to go beyond the initial requirements for lifting barriers to competition and to take additional actions in the future that might help promote competition" (at 12).

Like all the specific alternative plans that have been laid before the Commission in this proceeding, there are obviously ways in which NYNEX's approach could be improved. While treating special and switched access services separately is an improvement over lumping them together indiscriminately, a realistic approach also needs to recognize that there are more than two distinct markets that need individual accommodation.[5] Perhaps most

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[5] For example, residential markets have very different (continued...)

important, competition will emerge in a pinprick geographic pattern that cannot be easily captured by phrases such as a "substantial portion of the LEC's service area." NYNEX's plan needs to be rehoned in several important ways before it could become serviceable for the Commission's purposes.

The specifics of NYNEX's plan are perhaps less important that the fact that a major ILEC and the vast majority of the interexchange, large customer, and competitive industry segments all agree that the Second Further NPRM is misdirected in failing to address the removal of entry barriers. The Commission should instead insist on the creation of actual, facilities-based competition before grappling with appreciable price cap reforms.

II. THE INITIAL COMMENTS DEMONSTRATE THAT COMPETITION'S MODEST GROWTH SINCE THE ORIGINAL LEC PRICE CAP DECISION IS LEGALLY INSUFFICIENT TO SUPPORT THE RADICAL CHANGES PROPOSED IN THE SECOND FURTHER NPRM.

ALTS noted in its initial comments that the Second Further NPRM simply assumes the existence of a "revolution" in access and local competition, to use Bell Atlantic's catch phrase (Bell Atlantic Comments at 2: "The Revolution is Here"). After assuming "an increasing variety of local telecommunication services are available on a competitive basis," (at ¶ 5, citing only the First Report and Order at ¶ 25)), the Second Further

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[5](...continued)
needs than business customers. Similarly, cellular and PCS providers will have needs and behavior that will vary appreciably from, say, large data transport customers, even if the technology of the underlying services might appear identical.

NPRM immediately starts asking how price competition should be changed without glancing back at its factual claim. But the initial comments concerning the actual state of competition reveal that Bell Atlantic's "revolution" is all sound and fury, signifying nothing.

A. The ILECs Clearly Continue to Control Local and Access Markets.

The initial comments of the Telecommunications Resellers Association ably point out the present absence of any meaningful local, switched access, or special access competition (at 4-15; emphasis supplied):

- The Common Carrier Bureau's Fall 1995 "Common Carrier Competition" report shows that only four states have "active competition in switched local service."
- The Common Carrier Bureau's Spring 1995 "Common Carrier Competition" report shows that ILECs receive over 97% of all access revenues, and "the development of competition in local services is roughly a dozen years behind the development of competition in long distance."
- The First Report and Order in this docket concluded just nine months ago that: "[w]hile local access competition has begun to develop, the LECs continue to exercise a substantial degree of market power in virtually every part of the country, and continue to control bottleneck facilities" (at ¶ 368).

TRA goes on to make the important point that "competitive potential should not be confused with the emergence of actual competition significant enough to discipline market power. Contestable markets should not be equated with contested markets" (id. at 5).

The interexchange industry also agrees as to the lack of any evidence for the massive competitive surge envisioned by the Second Further NPRM. AT&T notes the ILECs recently agreed that: "cellular service is not a substitute for landline service 'as a matter of commercial reality'" (at 4-5). And "Sprint's experience as both an access provider and an access customer, consistent with data collected in various state and federal proceedings, has demonstrated that access competition is in its infancy. Because access competition is so embryonic, and because the terms and conditions governing RBOC entry into the interLATA market are as yet unknown, the Commission must be extremely cautious in evaluating any proposal to grant streamlined or nondominant regulation of interstate access services" (Sprint Comments at 3-4). And LDDS WorldCom: " ... LEC price caps have been a complete substitute for competition. There has been no market-based check on discrimination at all" (Comments at 10; emphasis supplied).

Large customers, who would be expected to know, also have not witnessed the onslaught of competition posited by the Second Further NPRM. See, e.g., Ad Hoc Telecommunication Users Group: "... LEC markets are not yet effectively competitive. The LECs may face some niche competition -- competition for some services in some limited geographic markets. For the most part, the LECs possess market power" (Comments at iii). "TCA also concurs that, where market forces can be relied on to protect consumers, they

are preferable to regulation. Nonetheless, TCA is concerned that the proposals in the SFNPRM go too far, too fast" (TCA Comments at 4).

Thus, the facts reveal that the Second Further NPRM is trying to usher in an age of wholesale competition that does not yet exist. While isolated pockets of special access competition do exist for certain locations in certain cities, the facts do not support the Second Further NPRM's belief in the immediate advent of widespread access competition.

B. The ILECs Present No New Evidence Concerning the Asserted Imminence of Widespread Competition.

While USTA and most ILECs applaud the dawn of competition envisioned by the Second Further NPRM, they offer few facts to support the notion that widespread access competition either exists or is imminent: (1) a Wall Street Journal article describing AT&T's desire to offer flat rate bundled service for local, toll and wireless services; (2) an article in Telecommunications Reports reporting competitive telecommunications revenues of $1.5B in 1995, and predicted revenues of $20B by 1998; (3) an updated list of planned competitive facilities; (4) a recapitulation of NYNEX's ex parte in the USPP proceeding concerning competition in the New York City LATA; (5) brief references to contentions made by SWB concerning competition in Houston and Dallas; and (6) reference to the fact that 66 companies filed requests for certification when California decided to open the local market to competition

(USTA Comments at 4).

These piecemeal allegations require little rebuttal. For example, the existence of sixty-six applicants for local service in the nation's largest state is entirely unremarkable given that over two hundred competitive interstate carrier CIC codes have been dispensed. Similarly, the planned facilities or the prediction of one individual concerning the possible future level of competitive revenues tells nothing about the current level of competition, nor does it suggest that increased competitive revenues will be possible without immediate and substantial success in the removal of barriers at both the state and Federal level. As for NYNEX's claims, TCG puts them into perspective in its Initial Comments (at 3-4): "For example, even in the New York LATA, TCG's most 'mature' local switched market, 71% of TCG's local switched services revenues are currently paid to NYNEX."

Indeed, the Second Further NPRM's reliance on its only citation, the First Report and Order in CC Docket No. 94-1 (at ¶ 25) turns out to be entirely misplaced:

> "There is growing evidence that an increasing variety of local telecommunication services is available on a competitive basis. This trend is most pronounced in larger urban areas where new entrants appear to be marketing their transport and other local services to high-volume toll users that offer the most lucrative returns. On the other hand, the competitive access industry is still very small....[W]e must retain the ability to regulate the significant set of services that are still provided on less than a fully competitive basis." (Emphasis provided)

Of course, ALTS certainly differs with the above quotation if it were interpreted to suggest that competition is sufficiently "pronounced" in larger urban areas to merit the waiver granted NYNEX in the USPP Order (released May 4, 1995, FCC 95-185). What is relevant for present purposes, however, is that the only citation offered by the Second Further NPRM flatly undercuts it by recognizing that: "... the competitive access industry is still very small."

Nor is the absence of any evidence of palpable competition somehow cured by USTA's re-introduction of its so-called "addressability" concept (see USTA's original comments at 62; and USTA's current Comments at 49-55). As ALTS has already pointed out in this proceeding (ALTS Comments filed June 29, 1994, at 6-13), "addressability" is defined by USTA as a situation where a provider "already [has] facilities that can readily extend service to the customer upon request. In effect, this indicator asks: Does the customer have real alternatives available" (USTA Comments filed May 9, 1994, at 62).

USTA's "addressability" approach is thus essentially tautological: competition exists where competition already exists. However, USTA has previously compared "addressability" to what is a well-understood economic concept, "contestability" (id.). But the Commission needs to remember that these are not comparable paradigms. In "contestable" markets, the absence of market power is the casual result of specific preconditions: free

entry and exit by the potential competitors to an entrenched monopolist. USTA's "addressability" approach makes no assertion at all about whether the conditions required for a "contestable" market actually exist in the access markets. Furthermore, the local telecommunications market is the antithesis of a "contestable" marketplace. Unlike examples such as the airline industry, local telecommunications is afflicted with long-lived assets -- switches, fiber, proprietary software, etc. -- which potential competitors could never exit costlessly under current regulation. See Train, Optimal Regulation (1991) at 303-08.

USTA goes on to use "addressability" to support its own ILEC price cap proposal, a plan that would move wire centers to lessened price cap regulation according to whether customers are sufficiently "addressable." The central difficulty with USTA's plan is that it is easily manipulated in a fashion that fails to reflect true competitive alternatives. ILECs can collude with major customers in an undetectable fashion, given the many interfaces that exist between ILECs and their medium and large end users. For example, ILECs provide deregulated inside wiring, Centrex intercom and vertical features, ICB services, dark fiber, specialized directory assistance, and other services whereby such customers could be given special preferences without easy detection. This makes it possible for the ILEC to have such customers order expanded interconnection in specific wire centers, and thereby shift those facilities into whatever status under the USTA plan the ILEC pleases.

C. Given the Commission's Existing Findings as to the ILECs' Market Power, the Second Further NPRM's Factual Assumptions Are Legally Untenable.

The Second Further NPRM's mistaken belief in the sudden emergence of effective competition not only would create bad policy, but would also fail to comply with the minimum requirements of the Administrative Procedure Act. While the Commission is entitled to considerable deference to its interpretation of its statutory authority pursuant to Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), that discretion is more limited concerning factual findings from a rulemaking record. In particular, the Commission cannot enter one finding in a proceeding (e.g., "... the LECs continue to exercise a substantial degree of market power in virtually every part of the country, and continue to control bottleneck facilities" (First Report and Order at ¶ 368)), and then proceed to operate on the very opposite conclusion "... sign of changing market structure" (Second Further NPRM at ¶ 5) only nine months later.[6]

[6] The Commission can, of course, reconsider its prior findings at any time pursuant to its applicable rules and precedent. However, the Second Further NPRM does not claim to be reconsidering the Commission's earlier findings. Quite the contrary, it simply ignores them.

III. THE INITIAL COMMENTS CONFIRM THAT THE SECOND FURTHER NPRM FAILS TO ADDRESS THE FUNDAMENTAL ISSUE OF PRICE DISCRIMINATION.

Among the most troubling aspects of the Second Further NPRM is its almost casual approach to the issue of unlawful discrimination. The initial comments of LDDS WorldCom correctly note that the statutory requirement of just and reasonable rates is coequal with the statutory requirement that rates be not unreasonably discriminatory, but the Second Further NPRM fails to devote even one of its many substantive sections to the issue of discrimination (LDDS WorldCom Comments at 2): "Like the dog that did not bark in the old Sherlock Holmes story, the absence of this word is telling evidence that something is wrong. The Notice fails to appreciate that LEC price discrimination will be the number one, two and three problems facing regulators in the transition to a more competitive market."[7]

A. The Second Further NPRM Needs to Address Unreasonable Discrimination.

It is all too apparent that the Second Further NPRM is fatally defective in its failure to grapple with the issue of

[7] The seriousness of the discrimination issue is amply demonstrated by the fact that only the General Services Administration, arguably the most powerful telecommunications consumer, is unconcerned with discrimination (Comments at 3). Even AT&T, the interexchange carrier with the greatest market ability to defend itself against discriminatory access pricing, opposes greater term and volume flexibility for the ILECs because of its concerns about discrimination (AT&T Comments at 29-30).

unlawful discrimination.[8] Perhaps the most grievous example is its proposal to remove lower Service Band Indices ("SBIs") for ILECs, even in the absence of competition (at ¶¶ 75-85). Until issuance of the Second Further NPRM, the Commission had attempted to avoid the discrimination issue when granting ILEC pricing flexibility by simply assuming that waiver situations involved the ILECs' high density areas. Further assuming that such high density areas have lower than average costs, the Commission concluded that the resulting structural cost difference justified any price discrimination produced by the waiver (USPP Order released May, 1995, at ¶ 85).

Whatever merits or defects this rough and ready analysis may have had in other proceedings, it obviously provides no cure for the discrimination issue here, since the Second Further NPRM proposes to permit unbounded downward price movement to incremental costs even in the absence of competition -- i.e., without regard to any factor whatsoever.

While the Communications Act forbids only "unreasonable discrimination," the continuing vitality of this statutory requirement remains clear, particularly given the Supreme Court's

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[8] The issue of unreasonable discrimination and anticompetitive pricing was discussed at length in ALTS' original comments in this docket filed May 4, 1994, and its reply comments filed June 29, 1994. In particular, ALTS proposed that the Commission employ a "transaction analysis" approach to detect and deter a wide range of potential anticompetitive ILEC activity. See the Joint Statement of Jerry B. Duvall and John G. Williams attached to ALTS' original comments.

robust reliance on the literal language of the Act in MCI v. AT&T, 114 S.Ct. 2223 (1994). It is apparent, as shown below, that the ILECs have substantially greater incentives to unreasonably discriminate than does AT&T under its price cap scheme, that those incentives will increase as the ILECs enter interLATA markets and face potential local competition, and that the potential effects of such discrimination are immense.

B. The ILECs Have Substantial Incentives to Discriminate.

Perhaps the Commission's experience with price caps for AT&T has caused the Second Further NPRM to misassess the discrimination threat posed by the ILECs in proposing substantial ILEC price cap revisions. In AT&T's case, it faced ubiquitous facilities-based competition despite its large market share. As LDDS WorldCom puts it: "AT&T price caps have been a supplement to a competitive market that was already in its adolescence by the time the price cap system began" (at 10; emphasis in original).

Furthermore, the discrimination issue for AT&T involved end user prices for certain services, such as Tariff 12. In the case of the ILECs, access charges are inputs to virtually all the interstate services which are provided nationwide. As a result, the discrimination issues have far greater impact in the ILEC context -- even before examining the potential for anticompetitive conduct, discussed below -- than they did under the AT&T price cap system.

Once the inappropriate analogy of AT&T is put aside, it is apparent that ILEC discrimination poses a palpable threat under the Second Further NPRM. First, the Regional Bell Operating Companies ("RBOC") are likely to be freed from the interLATA restrictions of the Modification of Final Judgment ("MFJ") under pending Federal legislation. If the RBOCs enter the long distance market, the touchstone discrimination issue of the past three decades -- the incentive for an entrenched, vertically-integrated monopolist to discriminate against potential competitors in any of its markets -- will once again be presented.

This was the predominant single issue in front of the FCC, the states, and Federal courts hearing telecommunications antitrust suits from the 1960s until the entry of the MFJ, yet the Second Further NPRM simply assumes it does not exist, or that the Federal legislation will somehow provide a quick and easy solution. This silent hope is totally unfounded.

Regardless of how many interconnection agreements and state certifications the RBOCs present in order to obtain the ability to provide interLATA service under Federal legislation, the simple economic fact remains that they will also have immense incentives to discriminate against their potential local and access competitors. Obviously, Congress is free to remove MFJ restrictions pursuant to whatever conditions it pleases, but this does not entitle the Second Further NPRM to blithely ignore the obvious discriminatory incentives for the ILECs that will result.